EB 05-53

ORIGINAL

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Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Arkansas Cable Telecommunications Association; Comcast of Arkansas, Inc.; Buford Communications I, L.P. d/b/a Alliance Communications Network; WEHCO Video, Inc.; and TCA Cable Partners d/b/a Cox Communications,	)	File No.: EB - 05 - MD- 004
Complainants,	)	
v.	)	
Entergy Arkansas, Inc.,	)	
Respondent.	)	

To: Enforcement Bureau
Federal Communications Commission

RESPONSE TO COMPLAINT

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Dated: April, 19, 2005

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EXECUTIVE SUMMARY

1. Modern society relies on electricity to run its air conditioning units, ICUs, gas pumps, and refrigerators, and Entergy Arkansas, Inc. ("EAI") takes its responsibility to supply safe, efficient and reliable power to the Arkansas population seriously. Its mission, however, is being undermined by tens of thousands of safety violations associated with the CATV plant of the Complainant Cable Operators. Comcast, Alliance and WEHCO are cumulatively responsible for 51,481 safety violations on EAI's poles, the vast majority of which (more than 95%) are violations not only of the pole attachment agreement provisions, but of the National Electrical Safety Code as well – the most basic industry standard.

2. The Cable Operators have also been responsible for thousands of emergency reports to EAI's call centers over the past several years, as evidenced by the reams of individual investigation and outage reports attached to this Response. They have been responsible for numerous outages, and it is clear that their facilities pose a danger to EAI's personnel and Complainants' own contractors. These conditions cannot be allowed to persist, and the FCC must not sanction the willful dereliction of duty perpetrated by the Cable Operators.

3. EAI has proceeded prudently and in accordance with the FCC's precedent by seeking to bring the Cable Operators into partnership to address the potential hazards on its cable plant. EAI has conducted multiple meetings with each company, sent dozens of letters and boxes of back-up materials, and conducted test inspections to investigate the cause of the emergency calls and outages. Finally, EAI concluded that full inspections were necessary given the extraordinarily high incidents of safety violations uncovered. EAI selected a reputable engineering firm with decades of experience and reasonable prices to conduct safety inspections,

and gave the Complainants every opportunity to participate in the full inspections. They have had literally years to correct the safety hazards identified on their plant, but the Cable Operators remain resistant. When EAI sought to require correction to preserve the integrity of its plant by restricting attachments on a circuit basis, the Complainants, and Comcast in particular, engaged in the most egregious form of self help possible and proceeded to ignore EAI's reasonable requirements and to attach to the poles they sought heedless of the safety implications of their actions. To date, very few corrections have been made, very few cited violations have been disputed, and no money has been paid to EAI for the cost of the inspections. Instead, the Cable Operators stymie negotiation attempts with unreasonable demands, refuse to make any good faith payment on monies owed, and permit their facilities to pose an ongoing danger.

4. While the Complainants seek to distract the FCC from the issue by putting forth unsubstantiated theories and arguments that have no basis in law regarding some unknown quantity of attachments that are grandfathered or are the responsibility of another entity, EAI has repeatedly urged the Complainants to specifically show EAI and its contractor where they believe they are entitled to relief with respect to the inspections. Virtually without exception, the Cable Operators have been unable to do so.

5. Moreover, their theories regarding EAI's engineering standards ring hollow. Rather than being "far in excess" of the NESC as alleged, the standards of EAI's pole attachment agreements conform to the most basic provisions of the NESC in virtually all respects. Where it differs is where the NESC would provide certain exceptions when several other highly technical conditions are met. Rather than requiring an untrained CATV contractor to make such decisions in the field or require costly and time consuming engineering analysis, EAI made the

determination that, for the safety and reliability of its plant, the exceptions would not be utilized. This is typical in the industry, reasonable, and ultimately saves time and money for the Cable Operators.

6. In sum, EAI has done everything in its power to work with the Cable Operators to accommodate their needs while firmly and reasonably refusing to degrade the integrity of its distribution plant. Complainants are now simply aggrieved they cannot get away with what they would like, and are using the FCC as a wedge to delay and thwart EAI's legitimate aims by seeking to have the FCC intervene in local utility engineering matters, an area already heavily and adequately regulated though multiple agencies on the state and local level. This abuse should not be countenanced by the Commission, and the Complaint should be flatly denied.

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RESPONSE TO COMPLAINT

I. INTRODUCTION

1. Entergy Corporation is an integrated energy company engaged primarily in electric power production, retail distribution operations, and gas transportation. Entergy owns and operates power plants with approximately 30,000 megawatts of electric generating capacity, and it is the second-largest nuclear generator in the United States. Entergy delivers electricity to 2.6 million utility customers in Arkansas, Louisiana, Mississippi and Texas.

2. *Entergy Arkansas, Inc. (hereinafter "EAI"or "Respondent"), is an operating subsidiary of* Entergy Corporation, and has served Arkansas customers for more than 85 years. EAI serves approximately 660,000 customers in 63 Arkansas counties, and employs approximately 3,500 people in Arkansas. EAI owns and controls distribution poles in Arkansas used for electricity distribution and wire communications, and EAI has joint use arrangements with telecommunications companies including Alltel, Southwestern Bell and CenturyTel for the use of EAI's poles in distributing electricity.

3. EAI is dedicated to the provision of safe, efficient and reliable electric power to the residents of Arkansas. EAI's actions in the current conflict have been directed solely towards ensuring that its goals and obligations in this regard are met. EAI has been diligent, patient, and flexible with a group of recalcitrant Cable Operators, who have ceased to take seriously their responsibilities under their pole attachment agreements and their obligations to their contractors, to EAI's workers, and to the public to maintain their own plant in safe manner. At its heart, this conflict is not about charges for inspections. It is about taking seriously the safety of the communities in which EAI operates and cleaning up communications infrastructure that were haphazardly thrown together to keep up with the growth demands of investors. CATV and electric facilities have ceased to operate in the symbiosis envisioned by Congress when the Pole Attachments Act was passed in 1978. The Cable Operators now seek the FCC's imprimatur on its behavior, counting on the favorable forum of the FCC to protect it from itself. Their cavalier disregard for their serious safety obligations cannot be countenanced by EAI, and the FCC should not endorse such behavior. Accordingly, EAI urges the FCC to deny the Complaint, find

EAI's actions reasonable, and require remediation of the Cable Operators' gross safety violations before the public is harmed.

II. BACKGROUND

4. EAI emphasizes that, along with other power utilities, it provides the core resource -- electricity -- that permits modern society to function. Without electric power, other industrial and business operations simply cannot be performed. EAI's effectiveness in supporting its utility operations and its users, and the reliability of electrical delivery to the State of Arkansas is directly dependent upon EAI's ability to maintain its electric plant in a safe and efficient manner, including maintaining and monitoring the vast network of transmission towers and distribution poles that populate its service territory.

5. EAI is obligated to its employees and the general public to ensure that the personnel coming into contact with its plant are adequately trained and that, when working on a pole, they enter an environment free from distraction and unexpected dangers. Line crews are routinely expected to work in close proximity to high voltage lines and related equipment, where even the slightest deviation from protocol could result in severe injury or death. The general public lives, works, and plays in proximity to utility poles that deliver electricity to the homes, businesses, hospitals, and government offices that make up their communities. Inadequate or shoddy communications line construction, unauthorized attachments, and non-compliant attachment configurations add to the complexity and the danger for utility and communications linemen alike, as well as for the population at large. Moreover, poorly maintained communications equipment can increase the potential for outages associated with poles damaged by vehicles, cable strikes, and weather related events, and can exacerbate delays for repairs.

6. EAI takes its stewardship of the electric grid seriously. It expects its own facilities to adhere to rigorous safety standards, and expects those with whom it contracts for access to its poles for the placement of cable and telecommunications equipment to share its dedication to safety and reliability. For this reason, EAI's pole attachment contracts require attaching entities to install – and maintain – their attachments in accordance not only with the National Electrical Safety Code ("NESC"), but also in compliance with the engineering terms specified by EAI. EAI requires that attaching entities submit applications to make attachments, including engineering specifications, for two reasons: First, to ensure that poles selected for communications attachments are capable of handling additional burdens or can be modified to do so; and second, to ensure that such attachments can be made in a manner that will protect all who come in contact with the poles.

7. EAI's goals are to minimize safety risks for its pole plant and to eliminate preventable electric outages. To these ends, when EAI was confronted with a high number of CATV related outages and trouble reports beginning in 2001, it sought the cooperation of one of its largest cable attachers – Comcast of Arkansas, Inc. ("Comcast") - in identifying and remedying the cable-related safety hazards on its poles. [1] Comcast acknowledged the safety issues associated with its plant, [2] and pledged to resolve them, submitting an action plan to EAI to review its plant

[1] The Complaint was filed on behalf of the Arkansas Cable Telecommunications Association, Comcast of Arkansas, Inc., Buford Communications I, L.P. d.b.a Alliance Communications Network, WEHCO Video, Inc. and TCA Cable Partners d.b.a. Cox Communications. This response addresses them collectively as "Complainants" or "Cable Operators" and intends to include all entities in these terms unless context dictates otherwise.

[2] While the Complainants speculate that EAI's motivation in addressing the cable operators' plant is to recover for damages sustained to EAI's own plant during a substantial ice storm that struck Arkansas in 2000, the Complainants' allegations are completely unfounded. EAI recovered all of the increased expenses and costs to repair its plant through a proceeding before

within 120 days and to clear all safety violations within 15 days of discovery.[3] Unfortunately, however, Comcast's efforts were woefully inadequate, and outages and trouble reports persisted including, among other issues, vehicles striking low-hanging CATV facilities and downed cable lines.[4]

8. In light of these ongoing safety issues, in September 2001 EAI initially engaged Wilfred Arnett of Utility Support Systems, Inc. ("USS") to conduct a random sample of inspection of third-party attachments to EAI poles in the Little Rock area.[5] Significant violations were noted despite Comcast's recent Follow Up Comcast Action Plan, in which it indicated it had completed all repairs.

9. EAI then engaged USS in December 2001 to conduct a test inspection of several randomly selected Comcast service areas.[6] The test inspection confirmed that the outages and trouble reports were related to Comcast facilities, and revealed that more than 30% of Comcast's attachments contained safety violations.[7] Comcast was presented with the results of the test inspection, and was informed that the severity and number of violations warranted a full inspection of their facilities. Comcast personnel were invited to participate in the full inspection,

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the Arkansas Public Service Commission. See *In re Application of Entergy Arkansas for approval to Use Transition Cost Account Funds to Pay for Ice Storm Costs*, Docket No. 01-296-U. The Complainants are correct, however, that the ice storm may be partly to blame for the onslaught of outages. This is because, to EAI's knowledge, none of the Cable Operators inspected their plant after the ice storm or repaired violations to their own plant that most certainly occurred during that time. See Declaration of David B. Inman at ¶ 16; Declaration of John Tabor at ¶ 25.

[3] See Comcast Action Plan, Exhibit "21."

[4] See Declaration of David B. Inman at ¶ 6.

[5] Declaration of Wilfred Arnett at ¶ 5.

[6] Id. at ¶ 7.

[7] Declaration of Tony Wagoner at ¶ 41; Declaration of Wilfred Arnett at ¶ 27.

but declined to do so.[8] *All told, USS identified 68,248 Comcast attachments to EAI poles, with* 47,413 safety violations.[9]

10. A similar process, and similar results, were experienced with respect to Buford Communications I, L.P. d/b/a Alliance Communications Network ("Alliance") and WEHCO Video, Inc. ("WEHCO"). Again, after experiencing high incidents of power outages and trouble reports associated with the cable plant for these two companies, EAI confronted them with the problem.[10] When their response was unsatisfactory (or absent), EAI engaged USS to conduct a test inspection of several randomly selected Alliance and WEHCO service areas.[11] The results of these inspections showed a violation rate of 25% for Alliance more than 80% for WEHCO.[12] Accordingly, EAI engaged USS to perform a complete safety inspection of Alliance's and WEHCO's facilities.

11. Although EAI received no notice at the time, EAI now understands that Comcast, Alliance and WEHCO undertook systemic upgrades and rebuilds of their cable television facilities attached to EAI's poles in the time frames corresponding with the significant number of CATV-related outages and trouble reports.[13] Because no notice was provided to EAI with respect to their activities, no "post construction inspection" by EAI could have taken place with respect to these upgrades and rebuilds. Complainants claim EAI was "aware of" their activities. However, they do not provide any documentation that they took steps to alert EAI to the scope or

[8] Declaration of Tony Wagoner at ¶ 42.
[9] Declaration of Wilfred Arnett at Attachment C.
[10] Declaration of Bernard Neumier at ¶ 18; Declaration of Michael Willems at ¶ 11.
[11] Declaration of Bernard Neumeier at ¶ 20; Declaration of Michael Willems at ¶ 16.
[12] Declaration of Wilfred Arnett at ¶¶ 36, 37.
[13] Declaration of Gary Bettis at ¶ 12; Declaration of Michael Willems at ¶ 14; Declaration of Bernard Neumeier at ¶¶ 13, 14.

nature of the work being done, or to coordinate in any manner with EAI to address the stress and loading impact on its pole plant of any CATV cable overlashing or equipment replacement.

12. The CATV facilities of Complainants are almost always the last facilities to be located on EAI's poles, and no one else, including EAI, has had an occasion to uniformly and systematically touch EAI's plant like the Cable Operators have had while they conducted their upgrades and rebuilds.[14] If there were violations present that the Complainants noted prior to, or in connection with, their upgrades or rebuilds, they should have brought them to EAI's attention when they were interfacing with a particular pole *as required by the NESC,* which does not permit new or modified installations to take place on poles with safety violations. They failed to do so.[15] Common sense also dictates that it is unsafe and inappropriate to add or modify a facility on a pole that contains safety violations; this would only compound the problem and complicate later remediation. Nevertheless, in their efforts to get their facilities up as quickly as possible, Complainants ignored safety considerations, the dictates of common sense, and the NESC, and failed to note or correct violations during their upgrades and rebuilds.[16]

13. In each instance, the full inspection was designed *solely* to address the safety issues that stemmed from the outages and trouble reports that were confirmed by the results of the test inspections. Only the cable plant was inspected and measured.[17] Of course, it was unavoidable that when inspecting the cable plant, USS would also observe safety concerns related to other

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[14] Declaration of Wilfred Arnett at ¶ 25.
[15] Declaration of Tony Wagoner at ¶ 23; Wilfred Arnett at ¶ 26.
[16] See, *e.g.*, Declaration of Brent Lewis at ¶ 4 (noting Comcast's instructions to line crews during upgrade planning *not* to note or measure violations identified on poles on which they were working).
[17] Declaration of David B. Inman at ¶ 13.

parties. Accordingly, EAI has attempted in good faith to account for this incidental benefit by allocating an appropriate portion of the inspection costs to the party found in violation, including itself and its joint use partners. EAI has also corrected violations related to its plant, and is pursuing other attachers with identified violations in order to require their remediation.[18]

14. With respect to TCA Cable Partners d/b/a Cox Communications ("Cox"), the inspections involved are of a wholly different nature. Cox has been working with EAI to design and install new cable facilities.[19] These were not safety inspections. Rather, the engineering tasks involved with the Cox projects include determination of necessary make-ready for new construction and post-construction inspections.[20] Where post-construction inspections have revealed discrepancies with respect to the "as-installed" versus the "as-designed" attachments, EAI has required Cox to rectify these issues. In fact, EAI questions whether Cox should be a Complainant at all, and request that, given the vastly disparate facts associated with this Complainant, that Cox be dismissed from the case.

15. In sum, the disputed inspections were a legitimate exercise of EAI's rights under reasonable contract terms designed to ensure the integrity of its distribution plant. But for the deplorable condition of Complainants' facilities, the inspections would not have been necessary. They were a reasonable and prudent response to hundreds of outages and incident reports that are directly attributable to poorly installed and poorly maintained cable facilities located on EAI's poles. EAI gave Complainants every opportunity to repair their plant, and remained open to discussing specific instances in which they had a different view as to the nature of, or

[18] Declaration of David Kelley at ¶ 12.
[19] Declaration of Tony Wagoner at ¶ 52.
[20] *Id.*

responsibility for, a particular safety violation. EAI has been patient and reasonable, only to be thwarted at every turn. The Federal Communications Commission (hereinafter "FCC," "Commission" or "Agency") should not countenance Complainants' effort to divert attention from their behavior and their sub-standard engineering practices by sensational claims associated with a small fraction of the pole attachments in question. Rather, as the FCC is charged with the fair and reasonable administration of the Pole Attachments Act,[21] it should focus on the magnitude of the safety issues that are indisputably present with respect to Complainants' attachments, and their utter failure to protect their workers, EAI's workers and the public from these conditions. The FCC accordingly should deny the Complaint.

III. ARGUMENT

A. EAI Is Obligated To Ensure the Safety and Integrity of Its Electric Plant

16. The continuation of uninterrupted power to our Nation's homes and businesses is a national priority. Congress, the FCC and the state utility commissions have recognized the importance of the Nation's critical infrastructure to the fabric of modern life, and its integrity and reliability are of paramount importance. For example, in the USA PATRIOT Act, Congress reaffirmed the vital importance of the Nation's critical infrastructure and the importance of ensuring its integrity, asserting that is shall be the policy of the United States to ensure that "any physical or virtual disruption of the operation of the critical infrastructures of the United States are rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States."[22] The

[21] 47 U.S.C. § 224; 5 U.S.C. §§ 551 *et seq.*

[22] Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, § 1016, 115 Stat. 400 (2001).

National Telecommunications Information Administration ("NTIA") has echoed this sentiment, noting that utilities provide essential public services and are vital components of the Nation's critical infrastructure, and any "system disruptions that are not quickly restored pose potential threats not only to Public Safety, but also to the Nation's economic security."[23] Our Nation's "economic prosperity, and quality of life have long depended on the essential services" that utilities provide.[24]

17. The National Association of Regulatory Utility Commissioners ("NARUC"),[25] is also acutely aware of the vital role electric utilities play, and the interrelationship of reliability and security that utilities must continually balance. NARUC recently observed succinctly and accurately:

> ....the concepts of security and reliability are intrinsically related. In the electricity context, reliability typically means that customers can obtain a given quality and quantity of electrical energy, more or less on demand, within the parameters specified in national electric reliability standards, quality-of-service rules enforced by State regulators, and utility tariffs. The concept of reliability directly triggers security concerns, as the greater part of modern-day society, including services integral to health and well-being, simply does not function without a reliable supply of electricity (or reliable emergency backup power when normal distribution is interrupted). Other utilities and networks are highly dependent on electricity. If an interruption occurs, arrangements must be in place to ensure that hospitals can

[23] Marshall W. Ross and Jeng F. Mao, Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, Response to Title II of the Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, Pub. L. No. 106-553, U.S Dep't of Commerce, National Telecommunications and Information Administration (Jan. 30, 2002) ("NTIA Report").

[24] President's Commission on Critical Infrastructure Protections, Critical Foundations - Protecting America's Infrastructures at ix (October 1997).

[25] NARUC is a national body whose members include the governmental agencies that are engaged in the regulation of utilities and carriers in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. NARUC's member agencies regulate the activities of telecommunications, energy, and water utilities. See, http://www.naruc.org/displaycommon.cfm?an=1 (last visited March 28, 2005).

> continue to provide care, traffic signals continue to work, water and wastewater are pumped, public transportation systems run, emergency communications are effective, economic losses and disruptions to businesses are minimized, and so on.
>
> The events of September 11, 2001 and August 14, 2003 [Northeast blackout] provide dramatic illustrations of the relationship between security and electric reliability. However, disruptions on a smaller scale also raise concerns. The growing reliance of the economy on complex and integrated information and data processing has increased the demand for a higher quality of reliable power and simultaneously reduced customers' tolerance for even momentary electricity outages.[26]

It is with this in mind that EAI works to secure the physical integrity of its plant and to obtain the assistance of its joint use partners and lessees in maintaining reliable electric service to EAI's customers. These efforts help ensure that other services necessary for modern life remain intact and reliable.

18. In an effort to safeguard access to reliable electricity by Arkansas residents and the integrity of the businesses and services that rely upon consistent, safe electric service,[27] the Arkansas Public Service Commission ("APSC") has also recently conducted an investigation into the reliability of utility plants in response to the large-scale blackouts in the Northeast in August 2003. The FCC has similarly recognized the uniquely public aspect of the services electric utilities provide and has, for example, accorded Critical Infrastructure entities heightened

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[26] National Association of Regulatory Utility Commissioners, Report of the Broadband over Power Lines Task Force at 13 (Feb. 2005), *available at* http://www.naruc.org/associations/1773/files/bplreport_0205.pdf (last visited Mar. 28, 2005). (Emphasis added).

[27] *See,* In re Investigation into the Reliability of the Electric Transmission and Distribution Systems in Arkansas, Docket No. 04-067-U, Order (May 4, 2004) ("In order to investigate and ascertain the reliability of electric transmission and distribution facilities in Arkansas, as well as identify any potential areas of concern that may require further investigation or rulemaking, this Commission has established the above-styled Investigative Docket.").

protection from interference to their communications in the 800 MHz band,[28] and retained restrictions on the coordination of frequencies formerly allocated exclusively to power utilities.[29]

19. On the local level, EAI is obligated to its employees and the people of Arkansas to ensure that its facilities are maintained in a safe manner, and that the services delivered via EAI's systems are reliable with a minimum of preventable interruptions. EAI is subject to requirements imposed by the APSC with respect to its reliability,[30] and is subject to the APSC's authority to ensure that retail customers have access to safe, reliable, and affordable electricity.[31]

20. EAI has numerous internal programs designed to address the unique reliability challenges associated with electric service in the State of Arkansas, which is located in an area of the country that can be subject to extreme weather conditions including some of the highest rainfall amounts in the country, frequent tornadoes, and intense lightening activity second only to the Florida peninsula.[32] Programs including the Targeted Actions Centered Toward Improving Customer Satisfaction (TACTICS), EAI's Targeted Circuit program focused on addressing poorly performing electrical feeders, the Backbone Feeder Inspection program, the establishment of regular inspections and replacements of electric equipment and hiring additional frontline

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[28] *See generally,* In re Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order*, FCC 04-168 (rel. Aug. 6, 2004).

[29] *See,* In re Industrial Telecommunications Association Informal Request for Certification To Coordinate
the Power Radio Service, Railroad Radio Service, And Automobile Emergency Radio Service under
Part 90 of the Commission's Rules, DA 04-3375 (rel. Oct. 29, 2004).

[30] Rule 8.01 of the Arkansas Public Service Commission General Service Rules; Rule 4.02 of the APSC Special Rules – Electric.

[31] Ark. Code Ann. § 23-2-304 (2004); Letter from Edison Electric Institute and United Telecom Council attached hereto as Exhibit "81."

[32] See, www.entergy-arkansas.com/AR/youhome/reliability.asp (last visited Jan. 31, 2005).

reliability workers have all contributed to an increase in EAI's system reliability over the past several years.[33] Additional EAI programs including the Infrared Inspection Process, the Reliability Servicemen process, the Engineering Inspection process, the Pole Line Inspection process, the Failure Batch process, the Critical Design process and general observation and inspection during the normal course of operations also ensure the integrity of EAI's system on a routine basis.[34] In this respect, it is also incumbent upon EAI to identify and eliminate CATV-related safety hazards and to require their prompt remediation when circumstances justify EAI's intervention, or when cable plant has been demonstrated as a cause for concern.

21. In view of EAI's own efforts, it is not unreasonable to require cable operators attached to EAI's poles to do their part – as they are obligated to do under the NESC and the pole attachment contracts – to maintain and repair their own attachments in order to refrain from adversely affecting the safety and reliability of EAI's system. Indeed, the Pole Attachment Act itself recognizes the high burden that utilities must shoulder in this respect, allowing them to completely *deny* access for reasons of safety, reliability, and generally applicable engineering purposes.[35] It necessarily follows that where access is granted, safety, reliability and generally applicable engineering purposes also justify ongoing conditions that ensure the integrity of the poles for *all* users. Complainants' practices and non-compliance with the reasonable terms of the pole attachment agreements and the NESC, however, have placed EAI's pole plant in jeopardy. This cannot be permitted to continue.

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[33] *Id.*
[34] Declaration of Michael Willems at ¶¶ 20-30.
[35] 24 U.S.C. § 224 (f)(2).

22. *The Pole Attachments Act and Commission precedent recognize the utility's right and* obligation to safeguard its pole plant, its electric operations, and its workers. In granting jurisdiction to the FCC over pole attachments, Congress recognized that the FCC is not the primary agency responsible for overseeing the electric utility industry, nor does it have any specific expertise with respect to electric utilities and their unique safety and operational issues. For this reason, in crafting the Pole Attachments Act, Congress carefully circumscribed the FCC's authority in this area solely to the determination of whether the rates, terms, and conditions of attachment are just and reasonable.[36] Moreover, Congress recognized that there are certain instances where access to utility poles for communications purposes is inappropriate, and the Pole Attachment Act therefore provides a specific exception to access for reasons of insufficient capacity, safety, reliability or generally applicable engineering purposes.[37] Of paramount importance, Congress expressly recognized that the safety of the electric utility plant must be safeguarded.

23. The legislative history of the Pole Attachments Act also illustrates that Congress recognized the safety of the electric plant was within the unique province and expertise of the utility. Under an early version of the Pole Attachments Act, H.R. 94-1630, the FCC could "not require a utility to provide any pole attachment if the *utility* has determined that any such attachment should not be permitted due to a matter not subject to the regulation of the [FCC]."[38] While this language eventually evolved into the language we are now familiar with in Section 224(f), this early understanding clearly informs the language of the provision and instructs that:

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[36] S. Rep. No. 95-580 at 15 (1977) ("This expansion of FCC regulatory authority is strictly circumscribed...").
[37] 47 U.S.C. § 224(f)(2).
[38] H.R. Rpt. No. 94-1630 at 6 (1976).

(1) the utility is uniquely positioned to understand the needs and limitations of its plant in terms of maintaining the safety and reliability of the Nation's electric network; and (2) the FCC is not the most appropriate entity to pass judgment as to practices not within its particular area of expertise.

24. Congress also recognized the local nature of pole attachment issues, allowing state public service commissions ("state PSCs") to effect a "reverse preemption" of FCC jurisdiction over pole attachments should they choose to do so. Even where a state has not specifically preempted FCC jurisdiction with respect to communications attachments, however, most state commissions, including the APSC, possess the statutory authority and expertise to address the electric utility engineering issues that Complainants seek to appropriate for the FCC.[39] It strains credulity, however, to read the Pole Attachments Act to say that, in specifying that the FCC may regulate the rates, terms and condition of communications attachments, Congress intended to provide the *communications* agency with jurisdiction over *electric* engineering issues that are local in nature and already regulated on a variety of fronts by other expert agencies.

25. Section 224(c) of the Pole Attachments Act, 47 U.S.C. §224(c), also implicitly recognizes that state law already addresses issues of safety, reliability and generally applicable engineering matters. For a state to preempt the FCC under section 224(c) with respect to both (1) rates, terms and conditions, and (2) pole or conduit access issues under section 224(f), a state need only certify that it regulates rates, terms and conditions. Section 224(c) does not require the state to additionally certify that it has authority to regulate access rights under section 224(f),

[39] Letter from EEI and UTC attached hereto as Exhibit "81"; Declaration of Steve Strickland at ¶ 5.

including the safety, reliability, or engineering issues noted in section 224(f)(2). Thus Congress appears to have understood that states already have and adequately exercise such authority.[40]

26. State PSCs are in day-to-day contact with the utilities under their jurisdiction, and are the most proficient bodies with respect to evaluating and understanding the utility both as a whole and in the context of the locality to ensure the safety and maintenance of their plants. In Arkansas, the public service commission is charged by statute to insure that retail customers have access to safe, reliable, and affordable electricity.[41] Among other things, this includes the obligation to: (1) find and fix just, reasonable, and sufficient public utility rates; (2) determine the reasonable, safe, adequate, and sufficient service to be observed, furnished, enforced, or employed by any public utility and to fix this service by its order, rule, or regulation; and (3) ascertain and fix adequate and reasonable standards, classifications, regulations, practices, and services to be furnished, imposed, observed, and followed by any or all public utilities.[42]

27. The FCC has recognized the unique interest utilities have in preserving the safety and stability of their electric plants by making sure that attachments to their poles are "safe and in accordance with agreed upon standards."[43] Further, the Commission has recognized the expertise of other agencies in addressing safety and reliability issues associated with the electric

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[40] Letter dated April 19, 2005 from Edison Electric Institute and United Telecom Council to Wm. Webster Darling at 4, attached hereto as Exhibit "81." In fact, in light of the structure of Section 224 and the limited experience of the FCC with respect to utility issues, and the clear indication that primary jurisdiction over electric utility engineering standards lay elsewhere, EAI questions whether the FCC even has the statutory authority to consider the relief requested by the Complainants.

[41] Ark. Code Ann. § 23-2-304 (2004).

[42] Ark. Code Ann. § 23-2-304 (2004).

[43] *Mile-Hi Cable Partners v. Public Service Company of Colorado,* 14 FCC Rcd. 3244, ¶ 19 (1999).

plant and those who come in contact with it, including the federal Occupational Safety and Health Administration ("OSHA"), the Federal Energy Regulatory Commission ("FERC"), state occupational safety commissions, and state PSCs.[44]

28. The cable industry's own engineering standards manual published by the Society of Cable Telecommunications Engineers also acknowledges the utility's experience and expertise in managing its plant and gauging its plant's safety, integrity and stability, and instructs cable companies installing facilities on utility poles to defer to the utility's judgment and the standards of the pole attachment agreement in the design and maintenance of CATV facilities.[45] The FCC has also declined in the past to adopt specific rules to determine when access may be denied because of safety, capacity, reliability, or engineering concerns.[46] Rather, these issues are generally addressed on a case-by-case basis as warranted.[47] For these reasons, the sound and reasonable judgment of the electric utility as to the measures needed to safeguard the integrity and safety of its electric plant should be accorded substantial weight and deference by the FCC.

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[44] See, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers Local Competition Order 14 FCC Rcd. 18049 at ¶ 1147 (1999) ("Local Competition Order").

[45] Society of Cable Telecommunications Engineers, Inc., *Recommended Practices for Coaxial Cable Construction and Testing*.

[46] *Id.*

[47] Indeed, this case-by-case approach embraced by the Commission highlights the reasonableness of EAI's inspection of Complainants' plant and its attempts to resolve engineering and safety disputes with Complainants. EAI has sought to address violations and disputes on a case-by-case basis, and has reasonably provided that Complainants may dispute a violation on a case-by-case basis. Where an Arkansas-licensed professional engineer has signed off on a cited violation affirming that the circumstance is either within the terms of the current NESC or grandfathered under a prior version of the NESC, EAI will accept such determination and consider the violation "cleared." EAI should not, however, be required to allow the Complainants a "free-pass" on an entire category of violations. This over-broad approach would leave numerous violations in the field, and would allow unsafe conditions caused by Complainants to persist.

In short, a variety of other agencies possessing greater electric utility and safety expertise than the FCC already have authority over those aspects of EAI's standards that Complainants seek to cap or to eliminate. The FCC should let those expert agencies and the utility address these issues, rather than relying on the thin reed of the Pole Attachments Act to justify sweeping changes over subject matter that is more comprehensively addressed by other, more specific statutes and regulations.

29. Here, as evidenced by the hyperbole and misstatements of Complainants, the Pole Attachments Act has ceased to operate as a shield to protect those companies that legitimately seek access to utility facilities, and is instead being used as a sword to hold hostage electric utility facilities and to bilk electric utility ratepayers. EAI has documented the extensive and pervasive safety violations by Complainants, as demonstrated in the attached exhibits. To date, inspections have revealed that 69.5% of Comcast's plant, 67% of Alliance's plant, and 84% of WEHCO's plant contain safety violations.[48] This gross neglect is deplorable, and has resulted in increased risk to the electric and cable contractors who come into contact with the poles and to the general public, as well as increased outages and expenses for electric utility ratepayers. The FCC must require the Cable Operators to remedy these violations post haste, to cease stonewalling, and end their pattern of delay and abuse.

B. *Complainants'* Attachment Upgrades and System Rebuilds Have Been Responsible for Numerous Preventable Outages and Have Created Safety Hazards that Must be Remedied

[48] See Declaration of Wilfred Arnett at Attachment C. *Excluding those few telephone company* owned poles that were inspected, violation rates remain consistent or higher for each company, with violation percentages amounting to 71.7% of Comcast's plant, 67% of Alliance's plant, and 84.6% of WEHCO's plant.